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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Implementation of Sections 3(n) and 332 of the Communications Act | ) | GN Docket No. 93-252 |
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| Regulatory Treatment of Mobile Services | ) | |



To: The Commission

# COMMENTS OF BELLSOUTH

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To: The Commission

## COMMENTS OF BELLSOUTH

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America (collectively "BellSouth") hereby submit their comments in response to the Commission's *Notice of Proposed Rule Making* ("*NPRM*") in this proceeding.

## SUMMARY

In response to the Omnibus Budget Reconciliation Act of 1993, [1] which amended Section 332 of the Communications Act of 1934, the Federal Communications Commission ("Commission" or "FCC") issued a *NPRM* to "(1) address the definitional issues raised by the Budget Act; (2) identify various services, including PCS affected by the new legislation and describe the potential

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[1] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 393 (1993).

regulatory treatment thereof; and (3) delineate the provisions of Title II of the Communications Act that will be applied to commercial mobile services." [2/]

In these comments, BellSouth shows that the objective of Congress was regulatory parity for like services. To achieve this objective, Congress intended the Commission to define the term "commercial mobile service" broadly to encompass a wide variety of mobile services. BellSouth's overall statutory definition of commercial mobile service can be summarized as follows: Commercial mobile service is any mobile service provided by entities other than a non-profit tax-exempt or governmental bodies (unless such entities provide service for a commercial purpose) which permits the exchange of information between a user of the mobile service and the public switched telephone network, provided at least five percent of the public in a given service area are eligible to use the service under FCC rules.

In line with the regulatory parity objective, BellSouth also recommends that commercial mobile service providers be treated alike and minimally regulated. Accordingly, the Commission should forbear from Title II regulation (except Sections 201, 202, and 208), given the competitive nature of these services. BellSouth supports the Commission's proposal that Sections 210, 212, 213, 215, 218-222, and 224 of the Communications Act should not be applied to commercial mobile service providers.

BellSouth also urges the Commission to revise its rules to remove many of the current service restrictions on particular frequencies. The Commis-

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[2/] Implementation of Sections 3(n) and 332 of the Communications Act, *Notice of Proposed Rule Making*, GN Docket No. 93-252, FCC 93-454 at ¶ 2 (October 8, 1993) ("*NPRM*").

sion should also allow all commercial mobile service licensees to provide dispatch service. Moreover, since the purpose behind the amendment to Section 332 is to treat similar services, from a regulatory perspective, (such as enhanced SMR and cellular) alike, there is no conceivable basis for continuing the wireline SMR ineligibility rules.

BellSouth submits that it would be unwise to adopt sweeping generalizations about the nature of interconnection a common carrier must provide. The Commission should determine the interconnection obligations of commercial mobile service providers on a case-by-case basis assuming a reasonable request is made. Finally, BellSouth supports the Commission's decision not to preempt state and local regulation of interconnection rates at this time.

## DISCUSSION

### I. THE TERM "COMMERCIAL MOBILE SERVICE" SHOULD BE DEFINED BROADLY, AS INTENDED BY CONGRESS

In the past, the legal, functional, and service distinctions between common carrier and private land mobile radio services became blurred, resulting in disparate regulatory treatment of companies competing against each other in providing similar services to members of the public. As BellSouth shows in Section I.B., Congress has now eliminated the old distinctions between common carrier and private mobile service, recognizing that some systems formerly classified as private provided service commercially on virtually the same basis as common carriers, but under a different regulatory scheme. As a result, competitive advantage was gained, not by merit in the marketplace, but by

leveraging regulatory disparities. The purpose of amending Section 332 was to create regulatory parity among competing providers of similar services.

Section 332 now divides mobile service providers into two classes: "commercial" and "private." In the *NPRM*, the Commission requested comment on how to define and interpret the terms establishing whether a given mobile service is commercial. [3] Section 332(d)(1) now defines commercial mobile service as:

> any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public. [4]

"Interconnected service" is defined by the statute as "service that is interconnected with the public switched network." [5] Congress delegated to the Commission the job of defining the basic terms used in these definitions. [6]

BellSouth urges the Commission to adopt definitions that will ensure that *all* commercial offerings of mobile service are indeed classified as commercial mobile service, and thereby eliminate disparate regulatory treatment of functionally equivalent services, as Congress required. Specifically, BellSouth proposes that the Commission adopt the following definitions:

> ***For profit means:*** *service is provided for a commercial purpose and the provider of the service is an entity other than a governmental body or an entity organized solely for nonprofit purposes and found qualified by the Internal Revenue Service for tax exemption*

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[3] *NPRM* at ¶ 10.

[4] 47 U.S.C. § 332(d)(1) (as amended).

[5] 47 U.S.C. § 332(d)(2) (as amended).

[6] *Id.*

*pursuant to 26 U.S.C. § 501(c)-(d), unless the governmental body or the tax exempt entity is providing service for a commercial purpose.*

***Interconnected service**, for the purpose of defining the term "commercial mobile service" only, means: a service where the provider, directly or indirectly, provides or facilitates a physical, electronic, or other means of transmitting or interchanging information between a mobile station and the public switched telephone network.*

***Available to the public means:** if, under the Commission's rules, there are only minimal restrictions on the eligibility of users for the service.*

***Effectively available to a substantial portion of the public means:** if, under the Commission's rules, the class of eligible users for the service exceeds five percent of the population in a licensee's service area, or as the Commission may determine on a case-by-case basis.*

Based on these building blocks, the statutory definition of commercial mobile service can be summarized as follows: Commercial mobile service is any mobile service provided by entities other than non-profit tax-exempt institutions or governmental bodies (unless such entities offer service for a commercial purpose) which permits the exchange of information between a user of the mobile service and the public switched telephone network, provided at least five percent of the public in a given service area are eligible to use the service under FCC rules.

BellSouth's proposed definition is designed to avoid loopholes, thus conserving valuable Commission resources by providing certainty of classification for existing and new services. The definition adopted by the Commission should, as a matter of sound public policy, be clear, simple, and objective. There should be little or no room for creative interpretation or manipulation that would permit the removal of services from the commercial category of mobile services to the private category.

## A. Proposed Definitions for the Elements of Commercial Mobile Service

### 1. Service Provided for Profit

The first element of commercial mobile service is that it must be mobile service "that is provided for profit." [7] Because the "for profit" test will be used to determine whether a service is deemed "commercial," the most reasoned basis on which to make this distinction is whether the service provider is a commercial or noncommercial entity. BellSouth proposes the following simple definition as the way to make this distinction:

> ***For profit means:*** *service is provided for a commercial purpose and the provider of the service is an entity other than a governmental body or an entity organized solely for nonprofit purposes and found qualified by the Internal Revenue Service for tax exemption pursuant to 26 U.S.C. § 501(c)-(d), unless the governmental body or the tax exempt entity is providing service for a commercial purpose.*

This interpretation of "for profit" accords with Congressional intent, because it will ensure that all providers of *commercial* mobile service are treated alike. [8] There is no indication that Congress intended anything other than to distinguish between service that is offered commercially and that which is purely non-commercial. Defining "for profit" so as to exempt only non-commercial entities, such as a governmental body or a non-profit, tax-exempt institution, serves this purpose. [9]

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[7] 47 U.S.C. § 332(d)(1) (as amended).

[8] *See, e.g.,* H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (Aug. 4, 1993) (Conference Report); Statement of Rep. Edward J. Markey (D-MA), Mark-up of Budget Reconciliation, Subtitle C, Licensing Improvement Act of 1993, at 3 (May 11, 1993) ("Markey Statement").

[9] Pursuant to 47 U.S.C. § 332(d)(1) (as amended), the Commission would retain the right to reclassify a mobile system operated by such an entity as (continued...)

There is also no indication that Congress intended the Commission to engage in case-by-case determinations of the actual or potential profitability of mobile service providers. It would be contrary to the public interest for the FCC to have to devote scarce resources to making such time-consuming and complex determinations. Such inquiries would embroil the Commission in lengthy inquiries as to the intent of the provider; complicated accounting questions concerning whether the venture was in fact turning a profit; and whether management firms or the ultimate users of shared systems are profiting from the venture. The statute makes clear that Congress did not intend the Commission to engage in extensive economic regulation of mobile service providers. [10/] Thus, it would be inconsistent with the statute to link "for profit" status to individual profitability. [11/]

### 2. Interconnected Service

The second element of commercial mobile service is whether "interconnected service" is offered. "Interconnected service," in turn, is defined as "service that is interconnected with the public switched network . . . or service for

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[9/](...continued)
commercial mobile service if its service was found, on a case-by-case basis, to be the functional equivalent of commercial mobile service.

[10/] Section 332(c)(1) specifically allows the Commission to exempt mobile service providers from most of Title II, such as provisions of Section 220 pertaining to "accounts, records, and memoranda . . . of the receipts and expenditures of money" and auditing of carriers' accounts. *See* 47 U.S.C. §§ 332(c)(1) (as amended), 220.

[11/] It is noteworthy that Congress expressly intended services such as PCS to be classified as commercial, not private. *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (May 25, 1993) (House Report). Classifying PCS based on a company's individual profitability would lead to the opposite result, however. This is because no PCS service providers are currently profitable. PCS will not show net profits for many years. BellSouth's test would classify PCS operators as "for profit," consistent with Congressional intent, however, because few, if any, PCS operators will be non-profit tax-exempt entities.

which a request for interconnection is pending." [12] Congress left the task of defining the elements of this definition to the Commission. BellSouth proposes the following definition for interconnected service:

> ***Interconnected service,*** *for the purpose of defining the term "commercial mobile service" only, means: a service where the provider, directly or indirectly, provides or facilitates a physical, electronic, or other means of transmitting or interchanging information between a mobile station and the public switched telephone network.*

The Commission should adopt this broad definition in order to effectuate Congressional intent to subject like services to the same regulation. Narrow definitions, or definitions based on specific technologies, will invite manipulation by service providers seeking a regulatory advantage over competing commercial mobile service providers. There are myriad ways in which a mobile system can take advantage of access to or from the public switched telephone network.

It is important that the definition not be tied to a particular technology because that would result in functionally equivalent services being classified differently, depending on the technology used. [13] For similar reasons, any means used by the service provider to make interconnected service available

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[12] 47 U.S.C. § 332(d)(2) (as amended). BellSouth addresses only the first part of this definition. The second part of this definition is self-explanatory: It merely ensures that a mobile service provider will be deemed interconnected if it has sought, but not yet received, interconnection with the public switched telephone network.

[13] For example, the use of acoustical or optical coupling, instead of a direct electronic connection, should not affect the interconnected status of a system. Similarly, the method of interchanging or transmitting information or signals should not impact on the regulatory treatment of the system. For example, the use of store-and-forward technology, protocol conversion, analog-to-digital conversion, packetization, transmission delays, an intermediary computer, or other means to avoid establishing a direct, real-time transmission path between the system and the network should not affect the system's interconnected status. There is no evidence in the legislative history that Congress intended a carrier's regulatory status to turn on the technical form of interconnection.

should fall within the definition; it should be irrelevant whether the service provider itself provides or controls the interconnection. [14] Moreover, the definition must focus on the service offered -- namely, the ability to transmit or interchange information -- and not on whether the transmitter can be controlled by the network.

Former Section 332(c)(1) of the Act established the dividing line between common carrier and private carrier status on whether the mobile service was interconnected with the "telephone exchange or interexchange service or facility." [15] In the House bill proposing to amend Section 332, the phrase "public switched telephone network" ("PSTN") was substituted. [16] The Conferees ultimately modified PSTN to "public switched network" ("PSN") without discussion. [17] At the same time, however, the legislation enacted gave the FCC broad discretion to define the phrase "interconnected to the public switched network." [18]

Based on the state of telecommunications networks today, BellSouth urges the Commission to define public switched network as the public switched telephone network -- i.e., the facilities of local exchange and interexchange

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[14] The "directly or indirectly, provides or facilitates" language in BellSouth's proposed definition ensures that a service provider cannot avoid classification as "interconnected" by using a third party as an intermediary, by acting as an "ordering agent," or by sponsoring a subscriber's interconnection cooperative. The proposed definition would not deem a system interconnected, however, merely because a *user* establishes its own interconnection without any direct or indirect involvement of the service provider. In that case, there is no offering of "interconnected service."

[15] See 47 U.S.C. § 332(c)(1).

[16] House Report at 262.

[17] Conference Report at 88, 495-96.

[18] *Id.*

providers of telephone service. The term PSTN is a clearly understood term within the telecommunications industry and thus provides a bright line test to determine the regulatory status of mobile service providers.

### 3. Service to the Public

The statutory definition of commercial mobile service requires that interconnected service be available "(A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." [19] According to the Conference Report, Congress rejected the view that "effectively available" should be limited to situations involving "broad classes" of eligible users. [20] Instead, Congress adopted a version which makes clear that a system can be classified as commercial mobile service even if it only serves "narrow classes" of users. [21] The statutory reference to "classes of eligible users" is clearly a term of art referring to the classes of eligible user categories that have been employed by the FCC. [22] Congress expressly recognized that a service limited to even a narrowly defined eligible user group can be "effectively available to the public." [23]

To further the objective of Congress, BellSouth urges the Commission to adopt the following definitions:

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[19] 47 U.S.C. § 332(d)(1) (as amended).

[20] Conference Report at 496.

[21] *Id.*

[22] *See* 47 C.F.R. §§ 90.17-.25, 90.35-.45, 90.63-.81, 90.89-.95.

[23] Conference Report at 496.

> ***Available to the public means:*** *if, under the Commission's rules, there are only minimal restrictions on the eligibility of users for the service.*
>
> ***Effectively available to a substantial portion of the public means:*** *if, under the Commission's rules, the class of eligible users for the service exceeds five percent of the population in a licensee's service area, or as the Commission may determine on a case-by-case basis.*

Any service for which the eligible class of users is unrestricted by the FCC rules is clearly public. So, too, is any service for which the FCC's rules establish only minimal user eligibility restrictions. For example, a service that may lawfully be offered to any member of the public except representatives of a foreign government is unquestionably available to the public.

The Commission's rules establish a wide variety of classes of eligible users. Some services, such as the Business Radio Service, have very broad classes of eligible users. Congress clearly contemplated that services such as these are "effectively available to a substantial portion of the public." [24] Congress did not, however, say that only those services with broad classes of eligible users should be considered effectively available to the public; the legislative history indicates that even services with *narrow* classes of eligible users might be deemed effectively available to the public. [25] The Commission must, therefore, ensure that services whose eligible user class encompasses a substantial minority of the populace are not automatically deemed private. BellSouth's proposed rule

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[24] Conference Report at 496.

[25] *Id.*

accomplishes this by using five percent of the population as the benchmark for being considered effectively available to the public. [26]

BellSouth urges the Commission to make the determination as to whether a service is available to a substantial portion of the public on the basis of its rules establishing the classes of eligible users. Congress intended that this be the criterion, as shown by its use of the term "classes of eligible users" in the statute itself. In particular, the Commission should *not* permit licensees to self-classify through voluntarily restricting who they will serve. The fact that a licensee chooses to offer only specialized communications that will appeal to a limited customer base, or chooses to promote its service only to a particular business sector, should not affect its status as a commercial service provider. [27] BellSouth's proposed definition would prevent service providers from manipulating their regulatory status by voluntarily restricting the base of customers they serve.

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[26] BellSouth recognizes that the FCC must use its discretion and expertise in determining the percentage because there is no absolute dividing line between "effectively available to the public" and "private." Five percent of the population was selected because Congress intended its definition to be sufficiently broad to include even "narrow" classes of users as being on the "public" side of the dividing line. Under this criterion, any service for which 95% or more of the public are excluded by the Commission's rules can reasonably be classified as "private." A similar benchmark keyed to the size of the business or industrial community is appropriate, where the Commission's eligible user classes is defined in terms of business activities.

[27] If that were the case, there would be no functional difference between a service provider deemed "private" because it chooses to serve only bakeries and a "commercial" mobile service provider, all of whose customers were bakeries. Even though the two were functionally identical, they would be subject to very different regulation, contrary to the intention of Congress. For example, the private service provider would be permitted to refuse to serve other businesses for any reason, while the commercial operator would be under a common carrier obligation not to engage in unjust or unreasonable discrimination against other businesses.

The Commission should also refrain from using system capacity or coverage to measure whether service is available to a substantial portion of the public. These factors could easily be manipulated by service providers to avoid classification as commercial. [28] Moreover, it is readily apparent that even a low-capacity or minimal-coverage mobile system can be effectively available to the public. [29] Another reason why actual serving capacity should not be the criterion for determining whether service is effectively available to the public is that few, if any, mobile service providers have the capacity at this time to provide service to all, or even a substantial portion, of the population of their service area. [30]

Consistent with the language of the statute and the legislative history, the availability of service to the public should be measured by whether the FCC's eligible user class for a given service provider makes a significant portion of the public eligible to use the service.

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[28] If the Commission based "effectively available to the public" on having a considerable traffic-carrying capacity or service area, a service provider could hold licenses under a variety of names, or operate multiple systems through management contracts, in order to avoid any single system having sufficient capacity or coverage to escape commercial status.

[29] For example, an interconnected mobile telephone system might meet all the mobile communications needs of the public in a suburban area or a rural village with only a few channels or a limited service area. A mobile service provider might provide microcellular service in an airport, railway station or shopping mall, serving all members of the public who are in transit through the facility. Despite its limited coverage area, such service should clearly be deemed commercial, not private.

[30] Cellular systems, for example, typically have just enough capacity to serve their customer base and expected roamers, yet their penetration rates are typically under five percent. Thus, cellular systems -- particularly in densely populated markets, where their capacity is most constrained -- would not be deemed "effectively available to the public" if their serving capacity were the criterion.

### B. The Legislative History Supports BellSouth's Broad Definition of Interconnected Service

Congress amended Section 332 to create regulatory parity for like services by classifying most mobile offerings as commercial mobile services. BellSouth has promoted this purpose by proposing broad definitions for the elements of commercial mobile service. Narrow definitions of these elements would result in a continuation of the disparate treatment of like services which prompted the legislation in the first instance.

#### 1. The Historical Blurring of Distinctions Between Private and Common Carrier Mobile Services Has Created Regulatory Disparity

Since 1949, the FCC has authorized land mobile service both on a common carrier and a private carrier basis. [31/] There has always been tension between the two because of the difference in how they are regulated. [32/] This distinction took on special significance in the mid-1970s when the FCC, for the first time, decided to grant licenses to commercial entrepreneurs who would provide service to others without being classified as common carriers. [33/]

The Commission recognized that these "common user" or "specialized mobile radio" ("SMR") system licensees would offer service in much the same way as common carriers. Indeed, it acknowledged "that some of the entities we propose to license, *i.e.*, entrepreneur-operated, common-user systems, could be

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[31/] *General Mobile Radio Service*, 13 FCC 1190 (1949).

[32/] *See id.* at 1238-41 (dissenting opinion of Commissioner Jones).

[33/] *Land Mobile Radio Service, Second Report and Order*, 46 FCC 2d 752 (1974), *recon.*, *Memorandum Opinion and Order*, 51 FCC 2d 945 (1975), *aff'd on other grounds sub nom. NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied* 425 U.S. 992 (1976).

licensed as common carriers and regulated under Title II of the Communications Act." [34] It also acknowledged that "SMR systems and radio common carriers are undeniably similar from a physical standpoint: the engineering specifications each employs, for example, are for practical purposes identical." [35] Nevertheless, the FCC asserted that there was a functional difference between the two:

> Radio common carriage has essentially functioned to extend public telephone service to moving vehicles. . . . SMR systems, on the other hand, are meant to have a fundamentally different application. These may only be licensed to provide base station facilities for "dispatch" service. [36]

Based on this functional difference, the FCC classified SMRs as non-common carrier, or private radio licensees. [37] Unlike common carriers, SMRs were not subject to any nondiscrimination requirement, their rates were not required to be just and reasonable, and they could choose whom to accept as customers. [38] Moreover, SMR applications (1) would not be subject to the public notice and petition to deny procedures prescribed by Section 309 of the Act and (2) would be exempt from state regulation. [39]

In *NARUC v. FCC*, the D.C. Circuit affirmed the creation of the SMR service. The Court warned the FCC that it did not have unbridled discretion to

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[34] 46 FCC 2d at 763.

[35] 51 FCC 2d at 959.

[36] *Id.*

[37] *See* 46 FCC 2d at 762-67.

[38] The obligations imposed by Title II of the Communications Act, 47 U.S.C. §§ 201 *et seq.*, do not apply to non-common-carriers.

[39] 47 U.S.C. § 309(b), (d). The FCC asserted the power to preempt state regulation of SMRs. 46 FCC 2d at 767.

define SMR as non-common carrier merely to meet its own agenda. [40] The Court observed: "A particular system is a common carrier by virtue of its *functions*, rather than because it is declared to be so [by the FCC]." [41] Further, the Court made clear that it would revisit the issue if and when SMRs behave like common carriers. [42]

Following much litigation over application of the holding-out indifferently to the public test articulated in *NARUC*, [43] Congress enacted Section 332 of the Communications Act in 1982. Its purpose was to "establish[] a clear demarcation between private and common carrier land mobile services" which would resolve much of the litigation. [44] On the face of the statute, the functional distinction between private and common carrier status hinged on whether the company offered interconnected service: private, shared systems could not be interconnected with the telephone network except by the users themselves. [45] On the other hand, common carriers were forbidden from providing "dispatch

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[40] *NARUC*, 525 F.2d at 644.

[41] *Id.* (emphasis added).

[42] *Id.* at 647.

[43] For example, in *John S. Landes, M.D.*, 77 FCC 2d 287 (1980), *recon.*, 86 FCC 2d 121 (1981), the Commission maintained that a paging system licensed in the Special Emergency Radio Service to a medical doctor was private, not common carrier. The system was operated commercially by a third party to sell the paging for profit to members of the medical community. It was functionally identical to, and competed with, common carrier paging facilities.

[44] H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 54, *reprinted in* 1982 U.S. Code Cong. & Admin. News. 2298.

[45] *See* 47 U.S.C. § 332(c)(1) (prior to 1993 amendment).

service." [46] Thus, the clear demarcation between private and common carrier revolved around dispatch versus interconnected service.

Following enactment of the statute, the Commission revised its interconnection rules for private land mobile systems. [47] Despite the statutory language, the Commission allowed private carriers such as SMRs to provide interconnected service that was functionally identical to that offered by common carriers as long as the private system operator passed through the interconnection cost without profit or mark-up. [48]

At the time, SMRs were not a major competitive threat to common carriers because SMRs typically had only a few channels and did not have the ability to provide large scale mobile telephone service, such as cellular systems would soon offer. This has changed in recent years, as enhanced SMRs have accumulated channels and introduced cellular-like technology. The first such systems were authorized in 1991. [49]

BellSouth and others demonstrated that enhanced SMR service could not lawfully include interconnection and remain private because such a system would be the functional equivalent of common carrier cellular service. [50] The Commission disagreed, stating that the test is not one of functional equivalence but whether or not a carrier "*resell[s] interconnected telephone service for profit.*

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[46] *See* 47 U.S.C. § 332(c)(2) (prior to 1993 amendment).

[47] *Private Mobile Radio Serv. (800 MHz Interconnection)*, 93 FCC 2d 1111, 1117 (1983).

[48] *Id.*

[49] *Fleet Call, Inc.*, 6 FCC Rcd. 1533 (1991).

[50] *Id.*

So long as a licensee continues to meet this requirement, . . . it remains a private carrier for regulatory purposes." [51]

### 2. The Purpose of Section 332, as Amended, is Regulatory Parity for Like Services

Congress responded to the dissimilar regulatory treatment of like services by amending Section 332 to ensure that "[a]ll commercial mobile services will be treated as common carriers." [52] Specifically, the legislative history states that private carriers have been allowed to provide "what are essentially common carrier services . . . while retaining private carrier status" [53] and have become "indistinguishable from common carriers." [54] The legislative history also expresses concern that "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private." [55] Accordingly, Congress amended Section 332.

The ultimate goal of the legislation was to create "regulatory parity" for like services. [56] The House Report specifically states that Section 332(c) was being amended:

> to provide that services that provide equivalent mobile services are regulated in the same manner. [The amendment] directs

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[51] *Id.*

[52] Conference Report at 491.

[53] House Report at 259-60.

[54] *Id.* at 210.

[55] *Id.*

[56] Conference Report at 495.

> the Commission to review its rules and regulations to achieve regulatory parity. . . . [57]

Similarly, the Conference Report stated that:

> It is the intent of the Conferees that the Commission . . . shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, *similar services are accorded similar regulatory treatment.* [58]

While attempting to create regulatory parity, Congress also recognized that commercial mobile service must be broadly defined. Chairman Edward J. Markey (D-MA), House Telecommunications and Finance Subcommittee, expressed "grave concerns that the temptation to put new services under the heading of private carrier is so great that both the FCC and the states would lose their ability to impose the lightest of regulations on these services." [59] He also made clear that:

> [T]his legislation ensures PCS, the next generation of communications, will be treated as a common carrier.
>
> . . .
>
> Like services should be regulated similarly in the public interest. So what the legislation proposes is that any person providing commercial mobile service, *which is broadly defined* to include PCS, and enhanced special mobile radio services, and cellular-like services, should all be treated similarly, with the duties, obligations, and benefits of common carrier[s]. [60]

The statute also narrowly defined private mobile service and made special provisions for the transition of private systems to common carrier status

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[57] House Report at 259. *See also id.* at 262.

[58] Conference Report at 494 (emphasis added).

[59] Markey Statement at 2-3.

[60] *Id.*

while making no corresponding transition rules for common carriers becoming private. [61] Thus, the legislative history of new Section 332 mandates a broad definition of commercial mobile service and parity of regulatory treatment for like services.

## II. CONGRESS INTENDED A NARROW DEFINITION OF PRIVATE MOBILE SERVICE

Congress defined "private mobile service" very narrowly, as the opposite of commercial mobile service: "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation of the Commission." [62] Based on the foregoing, it is clear that any service meeting the statutory definition of commercial mobile service cannot be deemed a private mobile service. Moreover, if the Commission adopts broad definitions for the elements of commercial mobile service, nominally private mobile services will not be the functional equivalents of commercial mobile service, eliminating any need for case-by-case reclassifications.

The only part of the statutory definition of private mobile service requiring interpretation is the phrase "or the functional equivalent of commercial mobile service". [63] BellSouth submits that this phrase was intended to ensure that like services are classified alike. Any service that is the functional equivalent of commercial mobile service should be classified as commercial, not private.

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[61] *See, e.g.*, 47 U.S.C. § 332 (c)(2), (c)(6) (as amended); Budget Act, § 6002(c)(2)(B), (d)(3)(B). *See also* Conference Report at 492, 494-95, 497-98; House Report at 262.

[62] 47 U.S.C. § 332(d)(3) (as amended).

[63] *Id.*

Thus, the statute excludes from the scope of private mobile service not only commercial mobile service, but also its functional equivalent.

If the Commission adopts the broad definitions for the elements of commercial mobile service proposed by BellSouth, the "functional equivalent" phrase will have very limited application, because virtually all of the functional equivalents of commercial service will already be classified as commercial mobile service providers. If, on the other hand, the Commission were to adopt narrower definitions of the elements of commercial mobile service, some service providers might attempt to slip through the loopholes and thus provide service functionally equivalent to commercial mobile service, while taking advantage of regulatory classification as private. Under these circumstances, the Commission has the obligation to reclassify such a provider as commercial. The provider of service functionally equivalent to commercial mobile service is specifically excluded from the definition of private mobile service by the statute.

The Commission, however, indicates that Congress might have intended to define commercial mobile service narrowly and cites the following passage for support:

> The Commission may determine, for instance[], that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or part of a network of systems or licenses, does not employ frequency or channel reuse or its equivalent. . . . [64]

This interpretation suggests that the "functional equivalent" language has an effect directly opposite to its plain meaning as an exclusion from the private radio classification -- "a service that fell within the *literal* definition of a commercial

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[64] *NPRM* at ¶ 32.

mobile service could nonetheless be classified as private if we determined that it was not *functionally* equivalent." [65]

Such an interpretation turns the statute on its head. [66] First, any service meeting the literal definition of commercial mobile service *is* commercial mobile service and must be so classified. The statutory language is clear and unambiguous in this regard and must be given effect.

Second, if a service is either commercial mobile service or the functional equivalent of commercial mobile service, it is specifically excluded from the private mobile service. Whether or not a particular service is the functional equivalent of a commercial mobile service, the statute makes clear that, if the service meets the criteria for commercial mobile service, it is excluded from the private mobile service. [67] Not all commercial mobile services are functionally equivalent to each other -- there are many kinds of commercial mobile services, such as PCS, cellular, and paging. Cellular, being a two-way service, is not the

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[65] *Id.* at ¶ 29.

[66] The Commission may have been suggesting that a particular mobile service provider may not have a commercial mobile service provider as a direct competitor, and does not therefore offer service that is functionally equivalent to a commercial mobile service actually offered in its market. The statutory definition of commercial mobile service governs, however: If the mobile service offered meets the definition, the service is commercial and may not be reclassified by the Commission merely because no competing commercial service provider provides the same kind of service.

[67] It is difficult to imagine how a service could meet the statutory definition of commercial mobile service and not be, at the same time, the functional equivalent of a commercial mobile service. Any service meeting the statutory criteria and FCC definitions for commercial mobile service is, by definition, the functional equivalent of itself. It is therefore not only a commercial mobile service, but also the functional equivalent of a commercial mobile service.